EVERGREEN FRONTIER (M) SDN BHD

v.

THE DIRECTOR OF LANDS AND SURVEYS (SABAH) & ANOR

HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT JC
[SUIT NO: S22-16-1999]
7 OCTOBER 2004

CONTRACT: *Offer - Offer and acceptance - Alienation of State land - State Government offering to alienate land - Offer withdrawn after payment of premium and fees - Whether in breach of contract - Whether an injustice - Exercise of discretion to withdraw thereof - Whether could be inquired into by court - Whether within court's jurisdiction - Land Ordinance (Cap 68) (Sabah), ss. 9(1), (2), 41(1), (2) - Government Proceedings Act 1956 s. 29*

The plaintiff had applied for a piece of land from the 2nd defendant, the State Government of Sabah. By letter dated 22 August 1997, the 2nd defendant offered to alienate some 503 acres of land ('the said land') to the plaintiff. The plaintiff accepted the offer and paid the 2nd defendant RM125,750, being 50% of the premium payable. The 2nd defendant, however, did not alienate the said land as offered. Henceforth, the plaintiff sued the 1st and 2nd defendants for breach of contract. Subsequently, the parties seemed to have settled their dispute when, by letter dated 9 November 2002, the 1st defendant, on behalf of the 2nd defendant, offered a replacement land to the plaintiff ('the replacement land'). However, alienation of the replacement land, too, was aborted by the 1st defendant, notwithstanding that the plaintiff had accepted the offer and had expended RM15,965 for its survey. According to the 1st defendant, the intended alienation did not have the "direction of the Cabinet" and therefore would not comply with s. 9(1) of the Sabah Land Ordinance (Cap 68) ('the Ordinance'). The facts showed however that such intended alienation did not at all in law require Cabinet approval. The defendants nonetheless urged that the plaintiff's claim be dismissed, arguing, principally, that the 1st defendant's exercise of discretion to withdraw the offer to alienate the replacement land was not appealable by virtue of s. 41 of the Ordinance. The primary issues that arose were: (i) whether the court had jurisdiction over the 1st defendant's exercise of discretion herein; and (ii) whether the defendants, in failing to alienate the replacement land to the plaintiff, were indeed guilty of breach of contract.

Held:

[1] The defendants have sent the plaintiff on a wild-goose-chase for 22 years, in the course of which the plaintiff has paid a substantial sum of money to the defendants or authorities related to them. Undoubtedly, what the plaintiff went through was an injustice. (p 162 g)

[2] The contention that the court has no jurisdiction to hear the plaintiff's claim is unsustainable. The courts do not countenance statutory provisions which purport to exclude judicial scrutiny of the exercise of discretion by public officers, more so where the discretion is exercised unreasonably or in utter disregard of accepted notions of justice and fairness. (pp 162 f, 163 g-h & 164 c-d)

[2a] The exercise of the 1st defendant's discretion, based as it were on what was clearly a trumped up excuse, could not be exempted from judicial scrutiny. In any event, s. 41(1) of the Ordinance does not preclude the court from exercising jurisdiction, just because the plaintiff's claim relates to matters pertaining to alienation of the replacement land by the 1st defendant. The court is concerned not with the alienation of the replacement land by the 1st defendant which is prohibited by s. 41(1) of the Ordinance, but rather with the withdrawal or revocation of the offer to alienate, which clearly falls outside the ambit of s. 41(1). (p 164 f)

[3] The issuance of the letter of 9 November 2002 to the plaintiff and its unconditional acceptance by the plaintiff undoubtedly constitute a binding contract between the plaintiff and the 2nd defendant. The 2nd defendant cannot wriggle out of the agreement to alienate the replacement land simply on the basis of the withdrawal letter. (p 164 h)

[4] It is inappropriate to grant declaratory and other orders requiring the defendants to proceed to go about issuing the document of title of the replacement land to the plaintiff. To do so would amount to an order of specific performance against the government and that is prohibited by s. 29 of the Government Proceedings Act 1956. The plaintiff, therefore, ought to be entitled only to damages.

[4a] The defendants must pay the plaintiff damages (to be assessed and with interest), including damages for loss of opportunity and full cost of the plaintiff's expenses for breach of and reliance on the agreement under the said letter of 9 November 2002. (p 165 b)

[Order accordingly.]

Case(s) referred to:

Burhan Ating v. Director Of Lands And Surveys & Ors [1992] 2 CLJ 1203 ***(dist)***

Lim Fong Tsin & 23 Others v. Assistant Collector Of Land Revenue, Beluran & Ors (Suit No. S(22)-24 of 1996) (unreported) ***(refd)***

Sa-mal (Sabah) Corporation Sdn Bhd v. Director Of Lands & Surveys, Sabah [1994] 3 CLJ 229 HC ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, s. 29

Land Ordinance (Cap 68) (Sabah), ss. 9(1), (2), 41(1), (2)

For the plaintiff - David Wong; M/s Peter Lo & Co

For the defendant - Halim Hanapia

Reported by WA Sharif

JUDGMENT

Linton Albert JC:

The 2nd defendant had on 22 August 1997 offered to alienate land to the plaintiff. The land offered was at Sungai Bangau-Bangau, Beluran comprising 503 acres more or less (the said land) under Land Application PT 92082134. The plaintiff accepted the offer and duly complied with the condition of the offer by paying RM125,750 representing 50% of the premium payable. The 2nd defendant did not proceed to alienate the said land to the plaintiff because the 1st defendant had, prior to the offer to alienate the said land to the plaintiff, issued the necessary papers called RSP to another group of 62 rival land applicants to survey the said land and upon the refusal of the 1st defendant to accede to the plaintiff's demand to cancel the RSP issued to the 62 applicants, the plaintiff commenced proceedings against the 1st and 2nd defendants for breach of the agreement to alienate the said land.

Subsequently, an amicable settlement appeared to have been reached when by a letter dated 9 November 2002 (the said letter) the 1st defendant, on behalf of the Government of the State of Sabah offered to amend the offer under PT 92082134 by replacing the said land and substituting it with land also at Sg Bangau-Bangau but in the District of Labuk/Sugut (the replacement land). The offer of amendment reflected in the said letter was promptly accepted by the plaintiff on 11 November 2002. Indeed, it was the plaintiff who initiated the process to bring about the amicable settlement and went through the whole rigmarole of identifying the replacement land which culminated in the issuance

of the said letter, the importance of which to the determination of the present case, merits its reproduction:

Bil Tuan Tarikh: 09 November, 2002

Bil Kami: LS.801.13366(vol.2)/10(aja)

Evergreen Frontier (M) Sdn Bhd
PPO.Box 1374
Sandakan.

OFFER OF AMENDMENT TO THE ACCEPTED OFFER LS.801.1.3366/107 DATED 22 AUGUSST, 1997 - PT92082134 AT SG. BANGAU-BANGAU, DAERAH LABUK/SUGUT

On behalf of the Government of the State of Sabah, I hereby offer to amend the accepted offer via LS.801.1.3366/107 dated 22 August, 1997:

- by the deletion of the sketch numbered LS.801.1.3366/106;
- and substitution of the amended sketch numbered LS.801.1.3366(vol.2)/10A, shown herein as per attachment, with additional conditions to the SCHEDULE and all approved land applications before this amendment and the existence of any customary rights within the area should be excised from the survey of PT.9208222134.

2. This Offer is open and valid only until and shall lapse on 09 February, 2003.

3. Please return a copy of this accepted Offer to the Director of Lands and Surveys signifying your acceptance by signing in the place provided.

4. Please return the accepted Offer to the Director of Lands and Surveys before 09 February, 2003.

"KEARAH PENGURUSAN TANAH YANG SEJAHTERA" "BERKHIDMAT UNTUK NEGARA DENGAN CEKAP, BERSIH DAN AMANAH"

Saya yang menurut perintah,

TT
(HJ. DAHLAN BIN HJ. A.H. TENGAH)
b.P Pengarah Tanah dan Ukur.

Pursuant to the said letter the plaintiff expended a sum of RM15,965 as survey fee and the replacement land was duly surveyed and measured and the plan forwarded for approval. It turned out that the plaintiff was to encounter yet another disappointment because the alienation of the replacement land to the

plaintiff like that of the said land was not to be. The offer contained in the said letter was capriciously withdrawn by the 1st defendant's letter dated 29 May 2004 (the withdrawal letter) which is reproduced. It is as follows:

Bil Kami: L.S.801.13366/vol.II(101) DAHT/rk Tarikh: 29 Mei 2004

Evergreen Frontier (M) Sdn Bhd
PO. Box 1316
90008 Sandakan(Fax:089-272005)

Tuan

OFFER OF AMENDMENT TO THE ACCEPTED OFFER
L.S. 801.13366/107 DATED 22 AUGUST 1997 -
PT.92082134 AT SG BANGAU-BANGAU, DAERAH LABUK/SUGUT

I am directed to refer to you in respect of the abovementioned offer which was issued under reference L.S801.1.3366(Vol.2)/10(aja) dated 09 November, 2002.

2. It has been discovered lately that this Offer of Amendment to the Accepted Offer was issued NOT in pursuant to the provision of Section 9(1) of the Land Ordinance, Cap 68 as it did not have the prior direction of the Cabinet. Therefore, it is reasonable to withdraw the said offer to enable you to formally apply the proposed replacement area in accordance with the normal alienation procedure.

3. In compliance with the above requirement, you are therefore advised to submit the formal land application to Penolong Pemungut Hasil Tanah, Beluran for the purpose of registration and processing in line with the normal procedural practice.

4. Therefore, you are kindly requested to return the original Offer of Amendment to the Accepted Offer under reference LS.801.13366(Vol.2)/ 10(aja) dated 09 November 2002 to this office immediately.

Thank you for your co-operation, please.

Saya yang menurut perintah,

TT
(HAJI DAHLAN HAJI. A.H TENGAH)
b.P Pengarah Tanah dan Ukur

The plaintiff accordingly amended its statement of claim to include an alternative cause of action engendered by the alleged breach of the agreement in the said letter and the defendants responded by amending their defence.

There is no controversy as to the issue that has to be determined which is this:

> Whether or not the Defendants are correct in law to say that the said offer of amendment was issued under a mistake and as such should be retracted.

In the circumstances, it is unnecessary to seriously consider the plaintiff's claim in respect of the defendants' refusal to proceed to alienate the said land because the sole issue agreed by the parties implies that the plaintiff's claim is confined to the withdrawal of the offer to alienate the replacement land to the plaintiff.

The defendants' amended defence contains the following substantive pleas:

> Para 11: ... the offer of amendment issued to the plaintiff is an effort between parties to seek an amicable settlement. The 1st and 2nd defendants state that any alienation resulting from that effort must be done in accordance to the provisions of the Land Ordinance (Cap 68).
>
> Para 13: ... section 41(2) of the Land Ordinance expressly states that the Court has no jurisdiction to adjudicate any matter which falls under the jurisdiction of the Director as provided under section 9 of the said Ordinance.

There are other ancillary defences but are not seriously pursued. I shall begin by considering para. 13 of the defendants' pleaded defence because if the defendants' contention is well-founded all other issues are rendered otiose. Learned counsel for the defendants, Encik Halim Hanapia, contends that s. 9 of the Land Ordinance Cap 68 confers a discretion on the 1st defendant to alienate State Land and the exercise of the discretion is, by virtue of s. 41(1), not appealable. Hence, it is argued, the court has no jurisdiction over the withdrawal of the offer to alienate the replacement land to the plaintiff. It will be useful to set out the relevant provisions of the Land Ordinance Cap 68 relied on by learned counsel for the defendants. They are as follows:

> Section 9:
>
> (1) Subject to any general or special direction of the Minister the Director may alienate State Land on such terms or in such manner as is authorized by this Ordinance and may also impose special conditions in respect thereof to be set out in the title.
>
> (2) In particular such conditions may specify the particular product or class of products which or which alone is to be cultivated, and may forbid the cultivation of any particular product or class of products.

Section 41(1)

> An Appeal shall lie from any order or decision of a Collector, Surveyor or Registrar given under this Ordinance to the Director, and again from any order or decision of the Director, whether original or an appeal, to the Court:
>
> Provided that no appeal shall be admitted:
>
> (a) after the expiration of thirty days from the date of the order or decision appealed against:
>
> (b) until the prescribed fees shall have been paid;
>
> (c) If it is expressly provided that the order or decision shall be final or if any other form of appeal is prescribed;
>
> (d) From any decision of the Director under s. 9 of this Ordinance.

Learned counsel for the defendants relies on *Burhan Ating v. Director Of Lands And Surveys & Ors* [1992] 2 CLJ 1203. With respect, I agree with the submission of learned counsel for the plaintiff, Mr David Wong that reliance on *Burhan Ating* is misplaced because the facts there are totally different from those in the present case. Here, there was an offer to alienate the replacement land which the plaintiff had accepted and pursuant to the offer, the replacement land had even been surveyed and measured and the plan forwarded for approval whereas in *Burhan Ating* the plaintiff there relied on letters of approval issued respectively by the "Setiausaha Hasil Bumi" of the Chief Minister's Office and the Assistant Collector of Land Revenue of the Lands and Surveys Department, Tawau, neither of whom is empowered to alienate land under s. 9 of the Land Ordinance Cap 68. Our courts, particularly in more recent times, do not countenance statutory provisions which purport to exclude judicial scrutiny of the exercise of discretion by public officers especially where the discretion is exercised unreasonably or in utter disregard for accepted notions of justice and fairness. Here, the defendants have sent the plaintiff on a wild-goose chase for 22 years, in the course of which the plaintiff paid a substantial sum of money to the defendants or authorities related to them and not a sen has been refunded to the plaintiff. If what the plaintiff went through do not constitute an injustice, I do not know what will. It is useful to quote a passage from the judgment of Richard Malanjum, J (as he then was) in *Lim Fong Tsin & 23 Others v. Assistant Collector Of Land Revenue, Beluran & 2 Ors* (Suit No. S(22)-24 of 1996) (unreported):

> And Section 9 of the Ordinance gives the Director the discretion on the alienation of State land subject of course to any general or special direction of the Minister. To that extent I agree with the view expressed by Ian Chin, J in the case of *Sa-Mal (Sabah) Corporation Sdn Bhd v. Director of Lands and Surveys, Sabah*

(O.M. No. K.4 of 1992) (unreported). However I do not think the discretion given to the Director therein should be construed as unfettered. 'Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint: where it is wrongly exercised, it becomes the duty of the courts to intervene. "Gopal Sri Ram JCA in *Datuk Bandar Kuala Lumpur v. Zain Azahari bin Zainal Abidin* [1997] 2 AMR 1671 at p. 1692.'

The defendants' plea under para 11 of the amended defence is also relevant to the question whether the court is precluded from determining the plaintiff's claim because it relates to the exercise of the 1st defendant's discretion to withdraw the offer to alienate the replacement land to the plaintiff. The withdrawal letter states that the offer contained in the said letter was not issued in accordance with s. 9(1) of the Sabah Land Ordinance Cap 68 "as it did not have the prior direction of the Cabinet," a proposition that was completely and clearly debunked by the defendants' own witness, Mohamad bin Jafry (DW1) the current Director of Lands and Surveys, Sabah whose relevant testimony merits reproduction:

Para 59 to 61 of the Notes of Proceedings:

Q. So the Plaintiff application does not need to be approved by the Cabinet.

A. Yes.

Q. Do you agree with me that what you said just now about approval by Cabinet does not tally with paragraph 2 of Page 22 of PBD.

A. Yes.

Q. So you are correct and your Deputy Director is incorrect.

A. Yes.

Surely, the exercise of the 1st defendant's discretion, based as it was, on what was clearly a trumped up excuse cannot be exempted from judicial scrutiny. In any event, I do not hold the view that s. 41(1) of the Sabah Ordinance Cap 68 precludes the court from exercising jurisdiction just because the plaintiff's claim relates to matters pertaining to the alienation of the replacement land by the 1st defendant. Here, the court is concerned not with the alienation of the replacement land by the 1st defendant which is prohibited by s. 41(1) of the Sabah Land Ordinance, but rather the withdrawal or revocation of the

offer to alienate, which clearly falls outside the ambit of s. 41(1). In *Sa-mal (Sabah) Corporation Sdn Bhd v. Director Of Lands & Surveys, Sabah* [1994] 3 CLJ 229, Ian Chin, J, while deciding that the refusal of the respondent to issue the offer to alienate land is a decision within the meaning of s. 9 of the Ordinance and thus the appeal against the decision was incompetent because of the prohibitions under s. 41(1) of the Sabah land Ordinance, went on at p. 237 to state as follows:

> It would have been a different matter if the appellant had already been issued the offer to alienate land and the respondent sought to revoke it

For the reasons aforesaid I hold that the contention of learned counsel for the defendants that the court has no jurisdiction to hear the plaintiff's claim is unsustainable. I do not think there is any merit in the defendants' contention that the PT (Permohonan Tanah) number in the offer contained in the said letter makes it necessary for the 1st defendant to issue the withdrawal letter thereby requiring the plaintiff to repeat the whole rigmarole of making another application for the replacement land from scratch. If defies logic how such an innocuous administrative matter can conceivably be elevated to such great importance by the 1st defendant as to require the withdrawal of the offer to alienate the replacement land. Indeed, it clearly goes to show that the exercise of the 1st defendant's discretion to issue the withdrawal letter is totally unreasonable.

The issuance of the said letter to the plaintiff and its unconditional acceptance by the plaintiff undoubtedly constitute a binding contract between the plaintiff and the 2nd defendant. The fact that both parties agreed on the sole issue set out above incontrovertibly implies admission of the existence of a binding contract. The 2nd defendant cannot, for the reasons I have stated earlier, wriggle out of the agreement to alienate the replacement land simply by issuing the withdrawal letter. I therefore hold that the plaintiff has successfully established its claim, which brings me to the final question of the reliefs sought by the plaintiff.

I do not think it is either useful or appropriate to grant the declaratory and other orders requiring the defendants to proceed to go about issuing the document of title of the replacement land to the plaintiff, not so much because the plaintiff may yet again be sent on another wild-goose chase but because the orders would run afoul of the Government Proceedings Act 1956. Although couched in language that does not appear to be inconsistent with the Government Proceedings Act 1956, the effect of these orders, if granted, would

amount to an order of specific performance against the government which is prohibited by s. 29 of the Government Proceedings Act 1956. In the circumstances I allow the plaintiff's alternative claim in damages and accordingly make the following orders.

1. That the defendants do pay to the plaintiff damages including damages for loss of opportunity and full cost of the plaintiff's expenses for breach of and reliance on the agreement under the said letter dated 9 November 2002 such damages to be assessed by the deputy registrar;

2. Discretionary interest on the damages to be assessed at the rate of 8% per annum from the date of the writ of summons to the date of judgment and thereafter there shall be statutory interest at the rate of 8% per annum from date of judgment to the date of full payment; and

3. Costs to the plaintiff to be taxed unless agreed.

There is nothing before the court to justify the orders for punitive and exemplary damages and are therefore disallowed.

Order accordingly